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No. 92-1489

In The

Supreme Court of the United States

October Term, 1992

ROBERT A. MINES, CAROLYN J. HOWARD, GARY ROBERTS, and a class of persons similarly situated,

Petitioners,

v.

DONNA SHALALA, Secretary of the Department of Health and Human Services,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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The respondent Secretary of Health and Human Services opposes the request for *certiorari*, boldly suggesting that there is not a conflict among the circuits on the issue presented for review. In fact, four circuits are in sharp conflict with the decision below; they do not merely present different legal theories for the same result, but actually apply three *completely different policies* to a common circumstance, which affects thousands of persons each year.

1. The Secretary does not contend that the First Circuit is in accord with the decision below. She admits

that *McCuin v. Secretary of Health & Human Services*, 817 F.2d 161 (1st Cir. 1987) stands in contrast to the three court of appeals decisions upon which she relies.[1] Nevertheless, she dismisses that case as "aberational and clearly wrong," claiming that "the First Circuit can be expected to reconsider it in due course without this Court's intervention." Brief for Respondent at 7.

The Secretary charges that petitioners do not endorse or defend the reasoning of *McCuin* (Resp. Br. 6), but that is irrelevant and is not the purpose of a Petition for Review.[2] Rather, Petitioners cited *McCuin* to demonstrate the diverse views in the circuits. The First Circuit's *McCuin* decision and policy is extremely different from the Secretary's position, and this regional disparity is admitted by respondent.

2. The Secretary simply hides from the holdings in the three other circuit opinions[3] which reject her view, pretending that there is no other conflict. She suggests

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[1] *Sheppard v. Sullivan*, 906 F.2d 758 (D.C. Cir. 1990); *Fox v. Bowen*, 835 F.2d 1159 (6th Cir. 1987); *Munsinger v. Schweiker*, 709 F.2d 1212 (8th Cir. 1983).

[2] In a similar vein, the Secretary states that petitioners "do not contend . . . that the text of the regulations precludes the actions taken by the Secretary," or attempt "any textual analysis of the regulations." Resp. Br. 5. Petitioners do believe that the regulations preclude the Secretary's actions. That is not, however, the basis for the petition which presents the circuit-wide conflict and the analyses of the law used by these appellate courts. As respondent is well aware, petitions for review are appropriately limited in scope.

[3] *Gutierrez v. Bowen*, 898 F.2d 307 (2d Cir. 1990); *Hale v. Sullivan*, 934 F.2d 895 (7th Cir. 1991); *Butterworth v. Bowen*, 796 F.2d 1379 (11th Cir. 1986).

that the Ninth Circuit "intimated – without explanation – that there was some tension between its conclusion" and two of the cases. Resp. Br. 7. The Ninth Circuit, however, more than intimates a tension, as it bluntly states that "[t]he circuits are split on this issue." Pet. App. at 4a; *Mines v. Sullivan*, 981 F.2d 1068, 1069 (9th Cir. 1992).

The Secretary mischaracterizes the holdings of both *Gutierrez v. Bowen*, 898 F.2d 307 (2d Cir. 1990), and *Hale v. Sullivan*, 934 F.2d 895 (7th Cir. 1991), as well as the import of *Butterworth v. Bowen*, 796 F.2d 1379 (11th Cir. 1986). Although respondent attempts to recharacterize both the *Guitierrez* and *Hale* decisions, claiming that they do not stand for the proposition that a case cannot be reopened for legal error, the language of the Second and Seventh Circuit opinions shows otherwise. In *Guitierrez*, 898 F.2d at 311, the Second Circuit clearly states: "Accordingly, if the Appeals Council's legal disagreement with the A.L.J.'s ruling was the sole reason for reopening, the case should not have been reopened." This language puts to rest the Secretary's assertion regarding *Gutierrez*. The Second Circuit prohibits reopening for legal error.

Similarly, the Secretary mischaracterizes the holding in *Hale v. Sullivan*. In *Hale* the Seventh Circuit stated:

> The district judge concluded that the Appeals Council possessed good cause to reopen Hale's case because he believed the case involved simply a recomputation of benefits. But the Appeals Council's decision was not founded upon a clerical error in the computation of benefits or an error on the face of the evidence. Instead, the Appeals Council re-assessed the ALJ's findings and issued its own determination that Hale was

> not disabled. *This type of change in administrative judgment does not amount to good cause to reopen a case under the regulations.*

934 F.2d at 897 (emphasis added). This language shows that the court was contrasting a clerical error, or clear factual error on the face of the evidence (which would allow for reopening), with a change in legal judgment, a legal error, for which reopening is prohibited. Thus, the Secretary's attempt to recharacterize the grounds in *Hale* as merely not showing "clear" error, as opposed to factual error, fails. In short, both *Hale* and *Guttierrez* disallow reopening for legal error.

3. Most disingenuously, the Secretary attempts to distinguish in a footnote the case applying a "component analysis" to the reopening regulations, *Butterworth v. Bowen*, 796 F.2d 1379, 1386 (11th Cir. 1986). Resp. Br. 8 n.5. *Butterworth*, the Secretary claims, is "inapposite" because the reopening in that case was brought under 20 C.F.R. § 404.988(a) and not under § 404.988(b), the good cause part of the reopening regulations. Although it is true that the reopening in that case was brought under a different part of the regulation than the current case, it is not true that the case is, therefore, "inapposite." The reasoning of the Eleventh Circuit applies to *all cases* of *reopening* brought under the regulations set forth in 20 C.F.R. §§ 404.987 and 404.988, 416.1487 and 416.1488. The Secretary's distinction is meaningless since it was not made by the court and has not been so interpreted in that circuit. More important, respondent has herself recognized the broad impact of the *Butterworth* decision in her own policy. Acquiescence Ruling (AR) 87-2(11), effective May 1, 1987, applies the *Butterworth* ruling to all of the cases in

the Eleventh Circuit states, and does not take the narrow view now espoused by the Secretary. The ruling states expansively:

> Where an ALJ's decision has become final (i.e., the 60-day time limit for appealing to the Appeals Counsel has expired, and the claimant has not appealed and the Appeals Council has not initiated own motion review within the 60-day time limit), the Appeals Council may not reopen and revise the ALJ's decision since the ALJ's decision is not considered to be properly before the Appeals Council.

By merely noting the distinction without import, respondent fails to address that the Secretary's position in this case has not been adopted by the Eleventh Circuit, and that citizens in that region are subject to a policy which is severely at odds with the Secretary's position in this litigation. Whether the Social Security Administration may reopen for good cause in the Eleventh Circuit depends upon at what administrative level the case currently resides. *Butterworth*, 796 F.2d at 1379.

Thus, the First, Second, Seventh and Eleventh Circuits have all adopted policies which are contrary to the decision below, and thus to the decisions of the District of Columbia, Sixth and Eighth Circuits. A decision from this Court would provide much-needed guidance to the lower courts, as well as to the Social Security and Medicare recipients themselves.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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June 1993